Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

CHRIS VENEKLASE, PAUL B. MEHL, DAROLD LARSON, NANCY EMMEL and JESSICA UCHTMAN,

Petitioners,

v.

CITY OF FARGO, DAVID TODD, JIM SCHALESKY, JON HOLMAN and WAYNE JORGENSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

For purposes of granting or denying qualified immunity, does the expressly narrowed constitutional construction of an ordinance by the United States Supreme Court constitute "clearly established law" governing police conduct in the enforcement of identical ordinances in analogous fact situations?

PARTIES TO THE PROCEEDING BELOW

Petitioners: Chris Veneklase; Paul B. Mehl; Darold Larson; Nancy Emmel and Jessica Uchtman

Respondents: City of Fargo; David Todd; Jim Schalesky; Jon Holman, Wayne Jorgenson

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Christopher Veneklase, Paul B. Mehl, Darold Larson, Nancy Emmel and Jessica Uchtman respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, which reversed the decision of the District Court and granted Summary Judgment to the Defendants/Respondents.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Eighth Circuit is *Veneklase v. City of Fargo,* 78 F.3d 1264 (8th Cir. 1996).

The published opinion of the United States District Court for the District of North Dakota is *Veneklase v. City of Fargo,* 904 F.Supp. 1038 (D.N.D. 1995).

Both opinions are reprinted in the Appendix which accompanies this Petition.

JURISDICTION

Review is sought from the decision of the United States Court of Appeals for the Eighth Circuit entered on March 6, 1996. The Petitioners' motion for rehearing was denied by the Eighth Circuit on April 24, 1996.

Jurisdiction is conferred on this Court pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTES AND CONSTITUTIONAL PROVISIONS

Set forth in Appendix E (p. 65a) are U.S. Const. Amendment I and 42 U.S.C. §1983.

STATEMENT OF THE CASE

On June 27, 1988, this Court decided *Frisby v. Schultz*, 487 U.S. 474 (1988), a residential picketing case involving anti-abortion protestors in Brookfield, Wisconsin. The *Frisby* Ordinance stated:

> It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield.

A similar Ordinance was in effect in Fargo, North Dakota on October 10, 1991. The Fargo Ordinance defined "picketing" and "dwelling", and then stated:

> **10-0802 Picketing of Dwellings Prohibited** No person shall engage in picketing the dwelling of any individual in the city of Fargo.

On October 10, 1991, Petitioners Chris Veneklase, Paul B. Mehl, Darold Larson, Nancy Emmel and Jessica Uchtman, along with ten to fifteen other individuals, decided to engage in silent prayer on Fargo's public sidewalks in the residential neighborhood of Jane Bovard, a woman affiliated with a local abortion clinic. Petitioners had no intention of targeting Bovard's residence with their presence, and it is undisputed that they gave no emphasis to Bovard's residence or to any other residence[1]. Petitioners limited their activities to the public

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[1]This Court should not be misled by the Eighth Circuit's assertion that "one protestor remained in front of the administrator's home at all times." (Opinion at Appendix A, page 2a-3a) This suggests that a protestor "remained" stationed in front of Bovard's house, which is false. The actual testimony from an affidavit of Respondent Holman is: "At all times, one or more protestors were in front of the Bovard home". Because it is undisputed that no emphasis was directed at *any* individual residence, the only proper conclusion is that there was always one or more protestors in front of *every* residence on the route, not just Bovard's.

streets and sidewalks, did not block anyone's access to or from private property, moved continually in front of an entire block of houses (six to eight residences), and remained silent during their prayer until they were approached by the Respondents, who were City of Fargo Police Officers responding to an unidentified complaint.

Respondents had arrived and observed Petitioners (and the others praying with them) for approximately ten minutes. They observed Petitioners walking north and south on the public sidewalk on Edgewood Drive. Some in the group were holding rosary beads and had their hands folded. It appeared to the Respondents that the Petitioners were meditating or praying, a fact recorded in their police report.

Eventually, Respondent Jon Holman approached the group and engaged in a conversation with Petitioner Chris Veneklase. Holman stated his belief that Petitioners were violating the Fargo Ordinance and instructed them that they would be arrested if they did not leave. Veneklase responded by insisting to Holman that the group was not picketing at all, a belief which Petitioners still hold but need not address here. Veneklase also told Holman that he had read the Fargo Ordinance and did not believe that the group's conduct fell within its scope. Veneklase was familiar with the terms of *Frisby v. Schultz* at the time.

Holman then reiterated that members of the group would be arrested if they did not leave. Veneklase then informed the others that they would risk arrest by continuing their prayer activities, after which most of them left. However, Petitioners Veneklase, Mehl, Larson, Emmel and Uchtman remained in Bovard's neighborhood and were arrested when they continued walking in silent prayer.

It is undisputed that Holman and the other Respondents did not know about *Frisby v. Schultz* when they arrested Petitioners, nor had they received any training from the City of Fargo on the enforcement of the Fargo Ordinance. Moreover, Holman offered the group no alternatives for remaining in the neighborhood, and no guidelines under which they could properly picket under Fargo's Ordinance. Upon being questioned at deposition, Holman disclosed his understanding that the Fargo Ordinance could be properly enforced to ban even the silent residential picketing of a single individual, regardless of the size of the route.

Petitioners were subsequently prosecuted by the City of Fargo for violations of the Fargo Ordinance, but the charges were dismissed on constitutional grounds by Cass County Judge Frank L. Racek on February 18, 1992. For a more detailed statement of the facts, see Appendix D (p. 60a-64a), Affidavit of Christopher Martin Veneklase.

On October 8, 1993, Petitioners filed a complaint in the United States District Court for the District of North Dakota, seeking damages from Respondents pursuant to 42 U.S.C. §1983 for the violation of their federal constitutional rights. On February 17, 1995, the District Court granted summary judgment to Petitioners on their federal constitutional claims and denied Respondents' defense of qualified immunity. On February 27, 1995, Respondents filed a Notice of Appeal in the United States Court of Appeals for the Eighth Circuit seeking interlocutory review on the qualified immunity issue pursuant to *Mitchell v. Forsyth,* 472 U.S. 511 (1985). On March 6, 1996, the Eighth Circuit issued a decision reversing the District Court and granting qualified immunity to the Respondents. The Eighth Circuit also denied

the City of Fargo's appeal on city liability for lack of a final appealable order.[2]

On March 20, 1996, Petitioners filed a motion for rehearing with suggestion for rehearing en banc, which was denied by the Eighth Circuit per Order dated April 24, 1996. Two Eighth Circuit Judges, Chief Judge Richard S. Arnold and Judge Morris Sheppard Arnold, voted to grant the suggestion for rehearing en banc.

REASONS FOR GRANTING THE WRIT

1. Conflicting Interpretations of *Frisby*.

There are three compelling reasons for granting the writ. First, the Eighth Circuit applied the Fargo Ordinance in direct conflict with this Court's carefully crafted constitutional mandate in *Frisby v. Schultz*, 487 U.S. 474 (1988), and also in conflict with the Sixth Circuit's understanding of *Frisby* as reflected in *Vittitow v. City of Upper Arlington*, 43 F.3d 1100 (6th Cir. 1995).

Frisby was also a residential picketing case involving anti-abortion protestors and a facial attack on an Ordinance which everyone agrees was "virtually identical"[3] to the Fargo Ordinance. An underlying assumption of Justice O'Connor's majority opinion, discussed more explicitly in Justice White's concurrence, is that the *Frisby* ordinance was unconstitutionally overbroad if understood in plain English, because it would mean a

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[2]Petitioners have named the City of Fargo as a Respondent in this Petition only because it was a party to the appeal below. The qualified immunity issues raised in this Petition, however, are directed only at the individual police officers: Respondents Todd, Schalesky, Holman and Jorgenson.

[3]Eighth Circuit opinion at Appendix A, page 6a, n.4.

total ban of residential picketing. However, the Court accepted the verbal representations of Brookfield's counsel at oral argument and "saved" the Ordinance with the following narrowed constitutional construction:

> General marching through residential neighborhoods, or even walking a route in front of an entire block of houses, is not prohibited by this Ordinance. Accordingly, we construe the ban to be a limited one; only focused picketing taking place solely in front of a particular residence is prohibited.

487 U.S. at 483.

With language directly pertinent to this case, the *Frisby* Court further defined the scope of picketing rights under the Ordinance:

> Protestors have not been barred from the residential neighborhoods. They may enter such neighborhoods, alone or in groups, even marching . . . they may go door to door to proselytize their views. They may distribute literature in this manner . . . or through the mail.

Id. at 484.

On October 10, 1991, Petitioners had taken this Court at its word and concluded that "solely" meant "solely". Armed with a general understanding of *Frisby* and resolved to be nothing more than a silent presence in Bovard's neighborhood, Petitioners walked a route covering a block of approximately six to eight houses to avoid any charge that they were "focusing" on anyone's residence. Yet, they were arrested for doing exactly what this Court held to be permissible in *Frisby*. Insult was added to injury when Respondents, utterly untrained in the enforcement of their own ordinance, were protected by the Eighth Circuit with qualified immunity based upon some alleged confusion in the law.

The Sixth Circuit certainly saw no confusion while reviewing similar facts and another identical ordinance in *Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1107 (6th Cir. 1995):

> *Frisby* could not be more clear: "[O]nly focused picketing taking place solely in front of a particular residence is prohibited."

Abortion remains the most controversial social and political issue in this nation, where many *Frisby*-style ordinances remain in effect. The decision below scrambles the analysis, which was heretofore clear to the District Court in this case, the Sixth Circuit in *Vittitow*, and the Seventh Circuit after the *Frisby* remand (see p. 9, *infra*) thanks to this Court's unambiguous, ordinance-saving construction in *Frisby*. Residential pickets must now choose between risking arrest or suppressing their desired speech, while police officers will enforce such ordinances at the risk of personal liability, depending on which view of *Frisby* prevails in their jurisdiction. Clarification by this Court of the proper scope of a *Frisby* ordinance, which really should not be necessary, is absolutely needed now as a result of the Eighth Circuit's unfortunate interpretation.

2. The Limits of Qualified Immunity.

The second reason for granting the writ is even more compelling because of the far-reaching issue of qualified immunity, a defense raised in hundreds of cases each year. The standard for shielding government officials with qualified immunity was defined in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), which abandoned any analysis of subjective "good faith" in favor of an objective standard. In post-*Harlow* cases, the threshold issue is whether a constitutional right has been violated. *Siegert v. Gilley*, 500 U.S. 226 (1991). If so, then the plaintiff

must show that the law regarding this right was "clearly established" at the time the violation occurred in order to overcome the defense of qualified immunity. *Id.*; *Harlow* at 818.

This Court revisited the qualified immunity issue and refined the "clearly established law" requirement in *Anderson v. Creighton,* 483 U.S. 635 (1986). Reminding us that "objective legal reasonableness . . . is the touchstone of *Harlow*", *Id.* at 639, the Court discussed the level of generality necessary for immunity to attach:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 640 (citations omitted).

It is difficult to imagine another case more clearly requiring the denial of qualified immunity than what Petitioners now present to this Court. Beyond any rational debate, *Frisby v. Schultz* provided clear, binding precedent from this Court to govern the conduct of the Respondents on October 10, 1991. The analysis of the District Court was exactly right:

> It is not necessary for a litigant to demonstrate precise factual correspondence with precedents in order to prove that the law was clearly established for qualified immunity purposes. *Jones v. Coonce,* 7 F.3d 1359, 1362 (8th Cir. 1993). "It is only necessary that the unlawfulness of the official's act is apparent in view of pre-existing law." *Id.* The Court finds that the unlawfulness of defendants' arrest of plaintiffs was apparent in light of *Frisby.*

> The similarity of the Brookfield and Fargo ordinances put defendants on notice that the Fargo ordinance was overbroad as written. The *Frisby* Court avoided constitutional difficulties presented by the Brookfield ordinance by construing the anti-picketing band to prohibit only focused picketing taking place solely in front of a particular residence. *Frisby,* 386 U.S. at 483. This narrowing construction clearly established the standard for analogous cases.

Appendix B, p. 40a.

Petitioners submit that this is not even a close case, and they are stunned by the Eighth Circuit's approach. Indeed, the reasoning of the Eighth Circuit panel is impeached by the very authority upon which it relied. The panel's reliance, for example, on the Seventh Circuit's remand opinion in *Schultz v. Frisby,* 877 F.2d 6 (7th Cir. 1989), is astonishing. Far from expressing confusion or uncertainty about the proper construction of the Ordinance, the Seventh Circuit refused to speculate beyond the construction of the Ordinance as handed down by this Court:

> The plaintiffs believe that the ordinance does not have the meaning the Town gave it in the Supreme Court. They ask us to certify the case to the Supreme Court of Wisconsin for an authoritative construction or at least remand the case so that the district court can hold further proceedings to pin down its meaning. Yet the meaning of a law is not a question of fact, to be stewed over in evidentiary proceedings. *So far as this case is concerned the meaning of the ordinance is what the Supreme Court said it means, and having this meaning it is constitutional.*

877 F.2d at 7 (emphasis supplied).

In spite of this language, curiously omitted from the opinion below, the Eighth Circuit found support in the

Seventh Circuit's observation that "[n]o matter how clear the ordinance seems, a hundred nice questions may follow in its wake." *Id.* at 8. The Eighth Circuit was apparently distracted by such language and lost sight of the narrow *Frisby* issue presented by this case, in favor of future hypotheticals. Such an abstract approach reduces the doctrine of qualified immunity to meaningless verbiage. If every hypothetical question must be resolved before we have "clearly established" constitutional principles to govern any set of facts, then every public official will be entitled to qualified immunity for hundreds of years to come.

A final question is worthy of consideration in light of this Court's prior statement that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law". *Malley v. Briggs,* 475 U.S. 335 (1986). What public policy consideration justifies granting qualified immunity to police officers who are so incompetent that they are totally unaware of even the general case law (if that is what *Frisby* is) governing the situations which confront them? It would be one thing if the Respondents in this case possessed a minimal grasp of the principles of residential picketing after *Frisby,* but simply stumbled when confronted with a legitimate gray area of interpretation. This case, however, presents quite another situation. Not only did the Defendants not know about *Frisby,* but it was their understanding that the ordinance could be enforced as a total ban on residential picketing. This is directly contrary to one of the precise holdings of *Frisby.* The award of qualified immunity under such circumstances is contrary to the very principles underlying that doctrine.

3. Stare Decisis and Confidence In The Courts.

The most important reasons for granting the writ are based upon the principle of stare decisis: to preserve public confidence in the decisions of this Court and to remind the lower courts of their duty to follow this Court's binding precedents. "If the doctrine of stare decisis has any meaning at all, it requires that people in their everyday affairs be able to rely on our decisions and not be needlessly penalized for such reliance." *United States v. Mason,* 412 U.S. 391, 399-400, (1973).

This is consistent with this Court's statement in *Maislin Industries, U.S. v. Primary Steel, Inc.,* 497 U.S. 116, 131, (1990):

> Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of stare decisis . . . .

The lower courts are bound by even summary decisions by this Court until such time as the Court informs them that they are not. *Hicks v. Miranda,* 422 U.S. 323, 345-46 (1975).

The duty to adhere to the statutory decisions of this Court has not been lost on some of the other federal circuits. As the Third Circuit has stated:

> As a lower court, we are bound by both the Supreme Court's choice of legal standard or test and by the result it reaches under that standard or test. As Justice Kennedy has stated, courts are bound to adhere not only to the results of cases, but also "to their explications of the governing rules of law." [citations omitted] Our system of precedent or stare decisis is thus based on adherence to both the reasoning and result of a case, and not simply to the result alone.

Planned Parenthood v. Casey, 947 F.2d 682, 691-92 (3rd Cir. 1991).

Likewise, the Sixth Circuit had adhered to this court's statutory interpretations in spite of some uncertainty as to governing standards:

> [B]ecause the Akron public indecency ordinance is virtually identical to the Indiana statute considered in *Barnes*, the district court was bound to adhere to the specific result of that case, even though the Supreme Court failed to agree on governing standards.

Triplett Grille, Inc. v. City of Akron, 40 F.3d 129, 135 (6th Cir. 1994). The Eighth Circuit was unmoved by this authority; should its decision below stand without comment by this Court, the public can rightly question whether this Court's constitutional decisions will have any real-life impact beyond the week they are decided.

CONCLUSION

For the reasons set forth above, Petitioners pray that their Petition For Writ Of Certiorari be granted.

Respectfully submitted,

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